BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NANCY ARB	)	
Claimant	)	
	)	
VS.	)	Docket No. 204,260
	)	
IBP, INC.	)	
Self-Insured Respondent	)	

ORDER

Respondent requested review of the December 20, 2002 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Appeals Board (Board) heard oral argument on July 8, 2003. The Director of the Division of Workers Compensation appointed Stacy Parkinson and Gary Peterson to serve as Board Members Pro Tem in place of Gary M. Korte, who recused himself from this proceeding, and for Gary Peterson, who retired from the Board.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for the claimant. Gregory D. Worth of Roeland Park, Kansas appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award dated December 20, 2002. In addition, the medical report authored by Dr. Bruce D. Geller is to be considered part of the record.[1]

ISSUES

Respondent appeals the ALJ's Award granting claimant a 34 percent permanent partial whole body impairment based upon a work disability. Respondent contends claimant voluntarily left her employment for reasons unrelated to any alleged injury.

[1] This report was omitted from the Award, but pursuant to the ALJ's ruling in an Order dated December 11, 2002, it is to be considered part of the record.

Alternatively, respondent argues that any work disability should be reduced to reflect a lower task loss.

Claimant maintains there is substantial and competent evidence to support the ALJ's award and asks the Board to either affirm the ALJ's findings or increase claimant's award to reflect an increased work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Award should be modified.

Claimant worked for respondent for approximately 18 months. During that time, she held several positions and experienced no physical problems associated with her work. In July 1995, she was assigned to use a dry vac to clean hides. Claimant is unable to state with any precision how long she performed this particular job. The record, when read as a whole, suggests she worked at this job for all of two days and part of a third. On the third day, she worked five hours before her complaints of pain in her left shoulder, neck and extending to her entire body were so severe that she could no longer continue to work.

Upon reporting her symptoms, respondent referred claimant to Dr. Edward G. Campbell for evaluation and treatment. Respondent reassigned claimant to a light-duty trimming position where she was to use a hook and knife. She performed that job for a few days and then complained of pain. Respondent then reassigned her to a different position which claimant described as "hanging plastic on the buttocks of the cow on the hide line."[2] She did this for another few days before complaining of pain and being reassigned to a third position.

The third position to which she was assigned involved her holding a clip board and observing product, noting certain information. Claimant was allowed to sit and stand as needed during her eight hour work shift. There were no physical requirements in this job, other than to make notations with the pen and holding the clipboard.[3] In each of these three positions she was paid the same pre-injury wage rate.

Claimant testified she was physically unable to perform this third and final position due to the pain she was experiencing. According to the claimant, she was so nauseous from the pain that she felt she should not continue. Claimant estimated that she worked at this job anywhere between a couple of days to a week and then elected to resign her

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[2] R.H. Trans. at 13.

[3] Id. at 46-48.

employment on July 17, 1995. There is no claim for temporary total disability benefits during this period nor did any physician direct her to refrain from working. At this point, claimant had not been released from treatment.

Immediately after terminating her employment, claimant enrolled in school. She was a full-time student at Emporia State University for the 1995 Fall semester and the 1996 Spring and Summer semesters. She then transferred to Wichita State University for the 1996 Fall semester. She later withdrew from school as she developed an unrelated biochemical condition that required a series of hospitalizations and according to her, compelled her to quit school and prohibited her from working.

Other than possibly two separate attempts to secure employment before she began school, claimant has made no effort to find appropriate employment after leaving respondent's employment.

After leaving her job and while attending school, claimant was apparently released from treatment by Dr. Campbell. She was then seen by Dr. Geller on June 14, 1996. According to Dr. Geller:

> It is my medical conclusion, to a reasonable degree of medical certainty, that Ms. Arb could have only suffered muscular strain from her activities at her place of employment on 7/18/95, and the approximately day and a half following that, while she was on the steam vac (or, as she refers to it, the "dry vac") position on the assembly line. There is no physiologic mechanism which could cause pain to the entire body, and specifically there would be no neurologic mechanism of injury which would be responsible for this type of complaint of total body pain. . . .
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> I detect no impairment of either a temporary nature or of a permanent partial nature to the whole body or to any body part, at this time, as a result of the activities performed by the patient on 7/18/95, or the two days following that date. Thus, since I conclude with a reasonable degree of medical certainty that she suffered some muscular strain, if any injury at all was truly suffered on that date, this would be a self-limited injury and would improve with time and particularly with the fact that she stopped performing this work many months ago. Thus, she would have to be considered at maximal [*sic*] medical improvement with regards to the workers' compensation injury of 7/18/95. She has a permanent partial impairment rating of the whole person with regards to the injury of 7/18/95 of 0%. There are no permanent restrictions that would apply to her with regards to the injury of 7/18/95.[4]

At her counsel's request, claimant was seen by Dr. Pedro A. Murati for an evaluation on August 12, 1996. Following this visit, Dr. Murati recommended additional treatment but claimant did not comply with his recommendation. She saw Dr. Murati again

[4] Dr. Geller's report is attached to ALJ Avery's Order.

on August 11, 1997. He concluded her condition was essentially unchanged and assigned a 17 percent whole body impairment for a combination of left shoulder and lumbosacral injuries. Dr. Murati further imposed permanent work restrictions of no frequent sitting, standing, walking, bending, climbing stairs, climbing ladders, squatting, crawling, driving, use of frequent repetitive foot controls and hand controls. She was also told to avoid awkward positioning of her neck.[5]

Pursuant to the ALJ's Order[6], Dr. Delgado was directed to perform an independent medical examination. At the doctor's request, claimant completed a pain diagram that failed to indicate any pain in the low back or in the left leg. She did, however, complain to Dr. Delgado of pain in her neck and left shoulder areas.

Dr. Delgado noted claimant's subjective pain complaints but concluded there was no objective findings of injury other than "mild positive Tinel's of the left elbow at the ulnar groove." He testified that this may explain claimant's left arm pain.

Based upon his examination and the medical records supplied by the parties, Dr. Delgado concluded that she suffered from "chronic pain syndrome." When asked to assign an impairment rating relative to her condition, the doctor testified that she bears a 7 percent to the left upper extremity in accordance with the AMA *Guides*[7]. Dr. Delgado further indicates that he was unable to conclusively relate the chronic pain syndrome diagnosis to claimant's work, although he did assign a 5 percent whole body impairment rating assuming the trier of fact were to conclude that syndrome was attributable to work. When combined, Dr. Delgado testified the claimant's impairment was 7 percent to the body as a whole.

Dr. Delgado was asked specifically about whether he would assign any work restrictions. He testified as follows:

> I did not feel that I could recommend any limitations of activities based on her subjective cervical shoulder complaints. I did suggest that she not use a backpack since she told me that that increased her pain. On that same basis I have -- I would also -- on that basis I would also recommend that the steel [sic] aprons used at IBP Packing Company may act like a backpack and that would be a restriction related to her shoulders from that, but I did not see any functional limitations with her upper

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[5] Murati Depo. (Jan. 8, 2001) at 18-19, Ex. 2.

[6] Entered by the retired Honorable Floyd V. Palmer.

[7] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (3rd ed. rev.). The third edition revised was the appropriate version to utilize for claimant's accident date.

> extremities. I did not feel the mild sensory neuropathy would have interfered with her work activities.[8]

When asked about a weight limit, Dr. Delgado testified that he limited the weight she should carry in her backpack to 10 to 15 pounds but indicated she required no restrictions with regard to manual lifting.[9]

Both physicians were asked to address the issue of task loss. Dr. Delgado reviewed the task list compiled by James T. Molski and concluded claimant would be incapable of performing 10 percent of the tasks contained within that list. He was also asked to review Karen Crist Terrill's list and concluded claimant would be incapable of performing 13 percent of the itemized tasks. Dr. Murati testified that claimant had lost the ability to perform 33 and 35 percent of the tasks outlined by Ms. Terrill and Mr. Molski.

Although neither party has addressed it, the ALJ apparently failed to determine the extent of claimant's functional impairment. The matter is essentially moot if the extent of work disability exceeds any functional impairment.[10] Nonetheless, it should be determined.

The record reveals three impairment ratings. Dr. Geller assigned a 0 percent impairment. In contrast, Dr. Delgado assigned a 7 percent whole body impairment while Dr. Murati assigned a 17 percent whole body. After considering the record as a whole, the Board is persuaded that it is more likely than not that claimant sustained an injury in July 1995 while in respondent's employment. The distinct physical nature of this job, when compared to her previous duties which were much less strenuous, strongly suggests that her acute onset of symptoms was related to work. Accordingly, the Board finds claimant suffers a 7 percent whole body impairment. This rating adequately reflects claimant's condition given her subjective complaints of pain in her cervical area plus her minimal ulnar nerve problems in her left upper extremity.

Whether claimant is entitled to an additional impairment beyond just a functional impairment, commonly referred to as work disability, is governed by K.S.A. 44-510e(a) (Furse 1993). That statute provides in pertinent part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was

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[8] Delgado Depo. at 20-21.

[9] Id. at 30.

[10] K.S.A. 44-510e(a).

> earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 44-510e(a) sets forth a formula for determining claimant's permanent partial general disability. But that statute must be read in light of *Foulk*[11] and *Copeland*[12]. In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wage being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work injury.

The controlling issue here is whether claimant refused employment that would have paid more than 90 percent of her pre-injury average weekly wage.[13] The ALJ stated "claimant left the employment of respondent because of her injuries."[14] The Board disagrees with this finding. Claimant was offered light-duty work following notification of her injury. On three separate occasions, she was assigned to alternative work and she only worked for a few days then complained. On the last occasion, she again worked for a few days and then elected to terminate her employment. The job that she was assigned to was flexible, allowing her to sit or stand as needed. Her job duties were minimal, requiring her to sporadically write down information. When she left respondent's employment, she advised them she was enrolling in college. She failed to make any significant effort to find employment and pursued her educational goal until sometime in 2000, when other health-related events intervened. No physician advised her to cease working in 1995. The evidence, overall, indicates that claimant took it upon herself to leave work and further her education.

The Board believes claimant failed to make a good faith effort to retain her employment with respondent. Respondent was accommodating her restrictions and doing

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[11] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[12] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[13] K.S.A. 44-510e(a) (Furse 1993).

[14] Award at 3.

what it could to allow her to remain employed. It is not reasonable to conclude claimant left work because of her injury. While it is admirable for any individual to seek higher education, the claimant cannot purposely walk away from comparable employment without consequence. Claimant's complaints of overwhelming nausea and pain are not corroborated by contemporaneous medical treatment records nor medical testimony regarding the advisability of remaining employed.

Under these facts and circumstances, the Board finds claimant is not entitled to a work disability pursuant to K.S.A. 44-510e(a) (Furse 1993). Accordingly, the ALJ's finding of work disability is hereby reversed and claimant is awarded a 7 percent permanent partial functional impairment.

The Board adopts the remaining findings and orders set forth in the Award that are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated December 20, 2002, is hereby modified as follows:

The claimant is entitled to 31.13 weeks permanent partial compensation at the rate of $282.95 per week or $8,808.23 for a 7.5 percent permanent partial general bodily disability which is due, owing and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of October 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director